Supreme Court, U.S.
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No. 01-1269

In The Supreme Court of the United States

CITY OF CUYAHOGA FALLS, et al.,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the decision of the Court of Appeals in this case when that decision is consistent with its own prior precedent, with the decisions of other circuits, and with decisions of this Court.

2. Whether a City should be held immune from liability for its actions that violate constitutional and statutory rights of citizens merely because those violations are accomplished by means of a referendum.

3. Whether this Court should review the decision of the Court of Appeals denying *res judicata* effect to a state court judgment on a related case when the question of whether the doctrine of *res judicata* acts as a bar to the instant case is entirely dependent on the interpretation of state law and the District Court engaged in an exhaustive analysis of applicable Ohio law in determining that Ohio's declaratory judgment exception to the doctrine of *res judicata* applies here.

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STATEMENT OF THE CASE AND FACTS

Respondent Developers[1] paid a premium price to purchase multifamily zoned property in the City of Cuyahoga Falls, Ohio, to construct an affordable apartment complex. (Pet. App. 17a) In developing their project, Developers complied with all site plan and zoning requirements, as well as with additional requirements imposed on them by the City. Faced with vocal opposition from residents of the City, a homogeneous community that is composed of 98% white residents, based on perceptions that African-Americans and families with children would move into Developers' housing complex, City officials allowed an unconstitutional referendum to be placed on the ballot and refused to issue the necessary building permits. By giving effect to a referendum petition, and to the motivations of certain of its citizens, the City sought to pull Developers' vested property rights out from under them.

The facts are clearly delineated by the Court of Appeals in its opinion. (Pet. App. A) The recitation of facts by the Petitioner omits a number of important matters. For instance, as the Sixth Circuit noted, the City Engineer sought advice from the City Law Director concerning the effect of the referendum petition on his authority to issue building permits for the Developers' property. (Pet. App. 9a) The City made the decision to not issue the building permits prior to any court decision on the legality of the referendum. Petitioner claims that the

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[1] The term "Developers" will be used throughout this brief to refer to Buckeye Community Hope Foundation; Buckeye Community Three, L.P.; and Cuyahoga Housing Partners, Inc.; in other words, all the Respondents except Fair Housing Contact Service.

Mayor's failure to sign the ordinance "pocket approved" it, even though admitting that the Mayor opposed the ordinance. (Pet. App. 3) The Mayor's failure to sign the ordinance, however, affected the timing of the decision to deny permits to the Developers. More important is the significant evidence of both the racial nature of the opposition to the housing project by citizens, including the organizers of the referendum petition drive, and of the encouragement given to those organizers by the Mayor. (Pet. App. 15a-16a) According to the Sixth Circuit, the circumstances surrounding the opposition to the project, "raise a genuine issue of material fact as to whether the City, in rejecting the ordinance which approved the site plan, gave effect to the racial bias of its citizens." (Pet. App. 17a) It is also important to note that this was the first and only site plan that the City had ever submitted to referendum. (Pet. App. 15a)

Based on the Ohio Supreme Court's determination that a referendum on an administrative matter violated the Ohio Constitution, *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 81 Ohio St. 3d 559, 692 N.E.2d 997, *on rehearing rev'd*, 82 Ohio St. 3d 359 (1998), the Developers were able to construct their apartment complex, after more than a three-year delay that has caused them significant damages.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO ISSUE REQUIRING REVIEW BY THIS COURT

Appellees' Petition for Certiorari should be denied. The Court of Appeals' decision is completely consistent

with existing precedent of this Court, of the Sixth Circuit and of other circuits. The opinion is well-reasoned, clear, and resolves important issues in a fair manner. The City's Petition quarrels with the interpretation of existing precedent, the application of the facts to the law, and the lower courts' interpretation of Ohio law, none of which are proper reasons for consideration by this Court.

The procedural posture of this case is the first sign that it is a case that is not proper for review by this Court at this time. The decision on which review is sought reversed a grant of summary judgment and sent the case back for trial. In reaching the decision that issues of fact precluded summary judgment, the Court of Appeals took into consideration a number of factual circumstances that the City would rather were not examined at all. However, as the Court of Appeals cogently explained, those factual circumstances, when considered in the proper light, support the claims raised by Respondents. Thus, to a great degree, the decision below turned on the application of the law to the facts, the type of decision that is not ordinarily reviewed by this Court, especially when the law in question was accurately stated by the Court of Appeals.

Moreover, the City has failed to show that any of the grounds on which the Court might decide to accept a case for review apply here. Despite Petitioners' attempt to manufacture such grounds, there is no conflict between the decision of the Sixth Circuit in this case and any decision either from this Court or from another circuit. Nor is there even any conflict between the decision of the Sixth Circuit in this case and any of its prior decisions. Of course, even if there were such an intracircuit

conflict, that would not be sufficient ground for granting the petition. *Davis v. United States*, 417 U.S. 333, 340 (1974).

In addition, a true untenable result could come from vacation of the Court of Appeals' decision and affirming the lower court summary judgment, i.e., the setting of a precedent that would allow a City to use a referendum as both a tool to block a housing project likely to be the home of many minorities and families with children, and as a shield from liability for such actions, even though the use of a referendum in such a way is a violation of Ohio's Constitution. If the actions of Cuyahoga Falls in the instant case do not give rise to actionable claims, then municipal governments would be given the message that as long as they do it through a referendum, they are free to violate statutory and constitutional rights.

II. AS CORRECTLY HELD BY THE COURT OF APPEALS, THERE ARE TRIABLE ISSUES OF FACT WITH RESPECT TO DEVELOPERS' EQUAL PROTECTION, DUE PROCESS AND FAIR HOUSING CLAIMS

A. Equal Protection Claims

Petitioners assert that the Sixth Circuit "strayed" from the decision of this Court in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977), which held that an equal protection violation can be found where a government decision maker is motivated by discriminatory motives. Petitioners are mistaken. The Sixth Circuit panel that decided this case did not stray from, but faithfully followed, *Village of*

Arlington Heights. Developers allege that the proponents of the referendum were motivated by racial bias, and that by allowing the referendum to have the effect it did, the City participated in and made manifest this racial discrimination. The Sixth Circuit properly inquired into "such circumstantial and direct evidence of intent as may be available" (Pet. App. 12a, quoting *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. at 266). After consideration of the circumstances surrounding the opposition to Developers' project, circumstances Petitioners choose to ignore, the Sixth Circuit concluded that a genuine issue of material fact existed as to whether City officials, acting on behalf of the City, gave effect to the racial bias of its citizens. (Pet. App. 17a) In reaching this determination, the Court of Appeals recognized the distinction between inquiring into the minds of voters, which it did not do, and considering the evidence as to the motivations of the organizers of the referendum petition drive, which can be considered as evidence of the nature of the opposition to the proposed housing project. (Pet. App. 19a-20a, quoting Judge Bell's opinion, 970 F. Supp. at 1318, Pet. App. 120a-122a) This "sensitive inquiry," mandated by *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, was entirely proper, and was supported by existing precedent and the facts of this case.

As noted by the Court of Appeals, there are a number of cases in which courts found an "equal protection violation where city officials gave effect to the race-based opposition of citizens who sought to block low-income housing from infiltrating their predominately white communities." (Pet. App. 20a). These cases include *United States v. City of Birmingham, Mich.*, 538

F. Supp. 819 (E.D. Mich. 1982), *aff'd*, 727 F.2d 560, 565 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984) (city liable for obstructing a racially integrated housing project in response to the racial animus of a majority of its virtually all-white community).

In this case, it is the motivation of the referendum organizers and the City officials who helped them achieve their goal – at least until the Ohio Supreme Court pronounced the referendum unconstitutional – that is at issue, not the motivation of voters, as in *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986). The act of placing a racially-neutral referendum on the ballot may not be *per se* unlawful (putting aside the illegality under Ohio law of a referendum on an administrative decision). However, if the referendum is used to block construction of housing because of the expectation that the occupants of that housing will include minorities and families with children, then giving effect to the referendum is a violation of both the Fair Housing Act and Equal Protection Clause. *See*, *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981).

While the City contends that its officials had nothing to do with the referendum, and had no choice but to refuse to issue the building permits to the Developers, the facts in the record belie such a conclusion. There is considerable evidence of discriminatory statements and indications of prohibited motivations in the context of the organizing drive to place the issue on the ballot. The connection of Mayor Robart and other city officials supporting and encouraging those who objected to the proposed housing to undertake a referendum campaign to halt the project is evidence to support the Developers' claims. Further, the delay and final refusal to issue the

building permit is evidence that the City officials acted in accord with the discriminatory wishes of certain members of their constituency. Such actions violate the Equal Protection Clause.

It also is important to note that the City's action in certifying the referendum occurred prior to any court case being filed, and before any court decision. Thus, the City's attempt to distinguish *United States v. City of Birmingham, Mich.*, 727 F.2d 560 (6th Cir. 1984) (where the discriminatory motives of citizens were "essentially adopted" by Birmingham city officials) fails. The City exercised discretion when it certified the referendum petition on a basis that was unconstitutional. At the very least, it is a question of fact whether the City had discretion regarding certifying the referendum petition and whether it did so based on discriminatory motives.

B. Fair Housing Claims

Petitioners are correct that the fair housing claim under the disparate treatment theory can be analyzed in the same manner as the equal protection claim. Thus, the arguments above as to the equal protection claim are applicable to the disparate treatment fair housing claim.

Respondents also raised a claim under the Fair Housing Act pursuant to the disparate impact theory. The Court of Appeals' decision on disparate impact under the federal Fair Housing Act does not conflict with other circuit court decisions. The Petitioners' argument that the Sixth Circuit's opinion "plows new legal ground" fails to cite any other circuit court's decision in conflict with it. Instead, the Petitioners rely on the

Sixth Circuit's decision in *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986) and argues that the decision in this case is in conflict with *Arthur*. Even if that were true, such a conflict would not of itself justify this Court's review of the case. Rules of the Supreme Court of the United States, Rule 10(a). *See*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

Even more damaging to Petitioner's argument is the reality that *Arthur* did not hold that a disparate impact claim can not be premised on the effect of a facially neutral referendum, as erroneously claimed by Petitioners. (Pet. 15) Instead, *Arthur* held that a referendum *can be* challenged under a disparate impact analysis when the plaintiffs can show "highly unusual circumstances." *Arthur*, 782 F.2d at 575. While the Petitioners argue that the Court of Appeals' opinion makes a "torturous attempt to find an exception to *Arthur*" they really only disagree with its analysis of "highly unusual circumstances" which is a factual dispute and not grounds for granting certiorari in this case.

C. Due Process Claim

The Court of Appeals held that Developers had set forth a valid claim for denial of substantive due process based on the City's use of a referendum to deprive the Developers of the effectiveness of their site plan. Petitioners challenge this holding by arguing that the Court of Appeals ignored its own precedent, *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); and assert that the holding in this case is in conflict with a decision from another circuit, *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992).

However, Petitioners' argument is meritless, as the Sixth Circuit's decision is consistent with its own precedent as well as with that of other circuits.

Relying on *Triomphe*, the City argues that the developers lacked a property interest. However, the Court of Appeals specifically distinguished *Triomphe* on two grounds, and found other precedent of the Sixth Circuit, *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), to be more apposite. Here, just as in *Nasierowski*, the "plaintiffs' had an affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan." (Pet. App. 29a) The Appellants' property interest was "securely vested" as of that point. *Id.* This case is *not* concerned with the refusal to grant a special use permit [*Triomphe Investors*] or rezoning land [*Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); also cited by the City]. Here the Developers are challenging a change in the settled expectations they had in the existing zoning code and their compliance with it by submitting an acceptable site plan that was approved by both the Planning Commission and City Council. While the ordinances of the City do grant broad discretion to the planning commission and to City council in considering site plan submissions and require the consideration of many factors, that fact is irrelevant to this claim because those factors had already been considered at the time of the denial of Developers' legitimate expectations.

The Developers had every reason to legitimately expect that in purchasing the property that was zoned for their intended purpose and in working up, at considerable expense, a site plan that then was approved by the

City's own Planning Commission and by City Council, they would be able to proceed to enjoy the benefits of the site plan, be issued the necessary building permits, and construct the planned housing development. To be denied the building permits because of the City's *own* illegal referendum process[2] is precisely the sort of "arbitrary and capricious" action that has been found to violate the right to due process. *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981); and *TLC Development Inc. v. Town of Brandford*, 855 F. Supp. 555 (D. Conn. 1994).

The *Gardner* decision is based on a very different set of facts. The developers in that case sought approval by a Planning Commission of a development plan based on a plat recorded twenty-five years prior. Among the numerous reasons given by the Fourth Circuit for its conclusion that the municipality had discretion to reject the plan was the fact that the old development plan had expired. 969 F.2d at 71. The dissimilarity between that factual situation and the facts of this case, in which the site plan was considered and approved by both the Planning Commission and by City Council and only then subjected to an illegal referendum process, is apparent. There is no conflict.

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[2] It must be noted that the law the City points to as providing a rational basis for its actions and eliminating the discretion of its officials was *its own law*. The law in question was not a law of the federal government, the state or the county; it was the law of Cuyahoga Falls. The City promulgated its own charter that provided for an unlawful referendum on an administrative matter, and the City itself interpreted that charter and acted illegally.

Petitioners' secondary argument is that because it took time for the Ohio Supreme Court to find the City's referendum process unconstitutional, the City's actions during that period could not rise to the level of "arbitrary and capricious." The City essentially argues for a rule that would allow a municipality to deprive citizens of fundamental property or liberty rights simply because the municipality has passed an ordinance or a charter provision permitting that deprivation, despite the fact that the provision in question violates the state constitution. Even putting aside the evidence of discrimination, the City, pursuant to its own devices, unlawfully delayed the Developers in constructing the housing project for which they had an approved site plan. The City cannot claim any rational reason for this conduct as all the factors which it was obligated to consider had already been weighed. This action by the City was arbitrary and capricious and constituted a substantive due process violation.

The Court of Appeals' decision properly concluded that Developers had a vested property right, and that the Respondents presented sufficient evidence to create a genuine issue of material fact as to whether the City, by denying the Developers the benefit of the lawfully approved site plan, engaged in arbitrary, irrational, and therefore unconstitutional application of the law, violating Respondents' right to due process.

III. THE COURT OF APPEALS' DECISION DOES NOT INTERFERE WITH THE FIRST AMENDMENT PROTECTION OF POLITICAL EXPRESSION

The Petitioners attempt to create a constitutional conflict where none exists in arguing that the Court of Appeals' decision infringes on or chills the rights under the First Amendment. This is simply not true. Under the Sixth Circuit opinion, citizens of Cuyahoga Falls have the right to attend meetings, to speak out against the development of a tax credit financed affordable housing, to vote[3] or petition their government for redress to the extent permitted by the Ohio and United States Constitutions. All these activities are protected under the First Amendment even if they are based on the citizens' desire not to have African-Americans or families with children moving into their neighborhood. The First Amendment protects them regardless how hateful their motivations. However, when City officials act on these protests and take discriminatory action, the City is liable for violating rights protected by federal law and the United States Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

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[3] Respondents are at a loss to understand Petitioners' citation to several Ohio Supreme Court cases which do not conflict with the Sixth Circuit opinion. (Pet. 7) Nor is the citation to *Bonas v. North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001) which involves an attempt to extend the terms of town council and school committee members in violation of a new Charter amendment helpful in showing some intercircuit conflict necessary to argue for the granting certiorari in the instant case. (Pet. 7) Nowhere in the Court of Appeals' opinion does it prohibit the City from going forward with any referendum.

Unfortunately, not only is racial prejudice extremely likely to be concealed, it is also quite easily disguised. This is because many common land use regulations, generally recognized as serving legitimate environmental and quality-of-life objectives, can be used to create indirectly or directly racial barriers to moving into a community. The federal courts have shown themselves capable of both looking behind catch words, used to conceal racial animus, and examining the sequence of events in determining the motivation of decision makers.

In *Arlington Heights* this Court specifically endorsed this type of direct or circumstantial evidence to prove an invidious discriminatory purpose. Courts may look to the legislative or administrative history, "especially where there are contemporary statements by members of the decision-making body, minutes of its meetings or reports." *Arlington Heights* at 266-67. Nor does it violate the First Amendment to use statements made by citizens at public or private meetings with public officials as evidence to show that the City's action was taken for an unlawful purpose. As this Court explained the First Amendment, "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 481 (1993).

The use of such statements as evidence to assist in determining if a discriminatory purpose was a factor of the disputed conduct has been universally supported by those Courts of Appeals presented with this question. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 428-29 (2d Cir. 1995) (organization formed to keep Orthodox and Hasidic Jews out of community conspired with village to

adopt zoning ordinance); *United States v. City of Birmingham, Mich.*, 727 F.2d 560, 564-65 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984) (opponents of racially integrated low-income housing openly stated bigoted views and opinions and the commission knowingly pursued policies that appeased these views); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (outspoken comments on the part of citizens attending public meetings used to establish invidious motive); and *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). (racist statements made and cheered at public meetings).

While this Court has always shown due deference to the right of the people to directly legislate, it has struck down such conduct when it violates the U.S. Constitution. As this Court has explained, a law adopted by means of the referendum process is not exempted from constitutional scrutiny, since "the sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). This Court has often struck down the results of elections or referenda that violated the rights of minorities. *See*, *Hunter*, 393 U.S. at 391; *Reitman v. Mulkey*, 393 U.S. 369, 391 (1967); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Romer v. Evans*, 115 S.Ct. 1092 (1995).

The federal civil rights laws and the First Amendment are not at war with each other. This litigation does not involve the "need to preserve the freedom of political expression" as the Petitioners claim. (Pet. 7) Instead, it involves the right to use private property for an already properly zoned public purpose. The Respondent

developers purchased property *already* zoned for multi-family use to construct their apartment complex and this constitutionally protected right *cannot* be sacrificed by a vote of the majority. The Constitution in general, and the Bill of Rights in particular, is the most important guardian of minority rights in a majoritarian political system. As James Madison recognized:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to. . . .

Reitman, 393 U.S. at 391 (Douglas, J., concurring), quoting 5 *Writings of James Madison* 272 (Hunt ed. 1904).

IV. PETITIONERS' STATE LAW ARGUMENTS REGARDING RES JUDICATA ARE NOT PROPER FOR REVIEW BY THIS COURT AND ARE IN ERROR

Petitioners attempt to cloak their state law argument regarding *res judicata* with a cite to *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984), but this question is purely an interpretation of Ohio law that should not call forth consideration by this Court. Moreover, the Court of Appeals was correct in adopting Judge Bell's holding that plaintiffs' suit is not

barred by *res judicata*. *See Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F. Supp. 1289, 1297-1303 (N.D. Ohio 1997) (Pet. App. 69a-83a).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Certiorari.

Respectfully submitted,

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